Public Prosecutor v Lee Eng Kooi

HIGH COURT (PENANG) — CRIMINAL TRIAL NO 47–45–88
VINCENT NG JC
31 MARCH 1993

Criminal Law *— Possession of firearms and ammunition — Internal Security Act 1960 s 57(1)(a), (b)*

Evidence *— Statement — Police investigation report — Admissibility — Distinction between first information and non-first information police report — Whether prosecution can refuse to supply report on ground that it was not first information report — Criminal Procedure Code (FMS Cap 6) s 113*

Evidence *— Credibility — Discrepancies between police reports and testimony — Whether charge could stand*

Criminal Procedure *— Trial — Prosecution led two sets of evidence — No reliable and trustworthy evidence on which to convict accused*

The accused was charged with two charges of possession of firearms and ammunition without lawful excuse in a security area under s 57(1)(a) and (b) of the Internal Security Act 1960. The prosecution called two witnesses, PW3 and PW9. PW3 stated that he led a police raiding party, including PW9, to a house in Air Itam, Pulau Pinang. On entering the compound of the house, PW3 said he saw the accused walking towards them holding a grey bag (P4), and after the accused was apprehended, P4 was examined before the accused, in which PW3 said they found the various items which were material in both charges. A subsequent search of the house revealed no incriminating items. However a black steel cylinder (D22), within which were other item also material in both charges, was found on the same day in the compound of the house. The details of what were in the cylinder were elicited from the other witness, PW9. Both PW3 and PW9 corroborated each other in material particulars. The only divergence in evidence between the two witnesses was that PW9 included two further exhibits, namely a pair of black long pants (P19) and a handkerchief (P20) as part of the contents of P4; whereas PW3 categorically asserted during his examination-in-chief that nothing else was found besides the items he had enumerated in his evidence. PW3 also stated that he had subsequently lodged a police report (P27) on the matters aforesaid. P27 was only put in as a prosecution exhibit subsequently, when he was recalled. When asked by the defence counsel during cross-examination PW3 said that he had refreshed his memory with P27 while giving evidence in court. PW9, during cross-examination, denied that the contents of P4 were in fact found in the compound in the steel cylinder and not in the grey bag (P4). Defence counsel immediately applied for a court order that a copy of P27 be

A supplied to him by the prosecution to enable him to cross-examine PW9 and other witnesses if it became necessary, which the court allowed.

Held, acquitting and discharging the accused:

B (1) The complete removal of the original provision in s 113(1) of the Criminal Procedure Code (FMS Cap 6) ('the Code') which states that 'no statement made by any person ... in the course of a police investigation ... shall be used as evidence' and its replacement with a new provision which states that 'where any person is charged ... any statement ... by that person ... shall be C admissible in evidence ... and ... may be used in cross-examination for the purpose of impeaching his credit', has the effect of clearly and decisively removing the pre-amendment distinction between first information and non-first information police reports. Therefore the prosecution cannot refuse to supply a copy of PW3's report D (P27) to the defence on the ground that it was not a first information report or for any other reason. Although such a report as P27 could not and was not put in for corroborative purposes, as soon as it was put in as a prosecution exhibit, it becomes substantive evidence and was liable to be commented upon by the defence as regards the consistency and truthfulness E of the witness.

(2) P27 clearly disclosed that the subject matter of the first charge being the three revolvers, were never found in P4. This would mean that the accused was not, as alleged in the oral testimony of the witnesses, caught red-handed with the three revolvers but rather these three revolvers were found outside the house encased F in D22. When the court considered the parol evidence of PW3 and PW9 and the statements in P27, the court found that there was an acute and material contradiction between them in regard to the exhibits found in P4. Therefore credible evidence on the first charge was thus lacking and the charge could not stand as it G had not been made out that the subject matter of the charge was in the possession of the accused.

(3) As regards the second charge, the contents of P27 and the oral evidence of PW3 and PW9 could not both be true and the court found that both the witnesses had lied on facts which were verifiable. In such a case where the prosecution leads two sets of H evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the court will be left with no reliable and trustworthy evidence upon which a conviction of the accused might be based. There were also other infirmities and unsatisfactory features in the prosecution case which made it unsafe to call the accused to enter upon his defence.

I (4) In view of PW3's admission that he had reviewed his report (P27) before he gave evidence and had also on occasion even referred to it while being cross-examined, he had given evidence in an unethical manner, without disclosing at the material time the gross

discrepancies in what he saw in P27; and had utterly discredited himself as a witness and intentionally misled the court. P27 stated that the three revolvers were found in D22 but PW3 testified that the same were found in P4. As P27 is a report lodged on the day of the offence, it is far more likely that all the offending items in both charges were found in D22 and not on the person of the accused. Thus the basic foundation of the prosecution case that the accused was caught red-handed crumbled.

(5) It is conduct unseeming and wholly incredible that the learned DPPs, being fully aware of the contents of P27 and keenly appreciating the ramifications of the material piece of oral evidence as it tumbled out from PW3, did not at that point in time and of their own volition, promptly throw in P27 at PW3 and sought to seek clarification from him. This would have avoided their skirmish with s 91 of the Evidence Act 1950. In this case, the learned DPPs had sought to get PW3 to clarify by recalling him and producing P27 as an exhibit, only after the court had ordered the supply of a copy of same to counsel. Here the conduct of the DPPs had given counsel the impression of suppression of the truth.

Per curiam:

It is impermissible to read ss 35 and 157 of the Evidence Act 1950 as permitting the prosecution to use statements made and recorded after investigations have commenced, be it in the form of first information report or non-first information report, to corroborate the testimony of a witness, because it is unjust and unfair to the accused to allow subsequent or non-first information reports detailing and setting out materials derived from an investigation, initiated and set into motion by a first information report, to be used for corroborative purposes, as their contents will be made to dovetail with materials in the case as have then developed.

[Bahasa Malaysia summary

Situduh telah didakwa atas dua tuduhan memiliki senjata api dan amunisi tanpa sebab yang sah di dalam satu kawasan keselamatan di bawah s 57(1)(a) dan (b) Akta Keselamatan Dalam Negeri 1960. Pihak pendakwa telah memanggil dua orang saksi, PW3 dan PW9. PW3 menyatakan bahawa beliau telah memimpin suatu rombongan serbuan polis, termasuk PW9, ke sebuah rumah di Air Itam, Pulau Pinang. Sebaik sahaja beliau memasuki perkarangan rumah itu, PW3 berkata bahawa beliau melihat si tertuduh berjalan ke arah mereka memegang sebuah beg warna kelabu (P4), dan selepas si tertuduh diberkas, P4 telah diperiksa di hadapannya dan di dalamnya, kata PW3, mereka menjumpai berbagai barangan yang penting kepada kedua-kedua tuduhan itu. Suatu penggeledahan rumah itu tidak mendedahkan apa-apa barangan yang membabitkan si tertuduh. Walau bagaimanapun, sebuah silinder keluli berwarna hitam (D22), di dalamnya terdapat beberapa barangan lain yang juga penting kepada

kedua-dua tuduhan itu, telah dijumpai pada hari yang sama di halaman rumah itu. Butir-butir tentang apa yang terdapat di dalam silinder itu telah diperolehi daripada saksi yang satu lagi, PW9. Kedua-dua PW3 dan PW9 memberi keterangan yang menyokong satu sama lain dari segi yang penting. Perbezaan tunggal dalam keterangan kedua-dua saksi itu ialah PW9 telah menyertakan dua eksibit tambahan, yakni sepasang seluar panjang berwarna hitam (P19) dan sehelai saputangan (P20) sebagai sebahagian daripada kandungan P4; sementara PW3 menegaskan semasa pemeriksaan utama bahawa tiada apa-apa lagi yang dijumpai selain daripada barangan yang disenaraikan dalam keterangannya. PW3 juga menyatakan bahawa beliau kemudiannya telah membuat suatu laporan polis (P27) tentang perkara tersebut. P27 cuma kemudiannya dimasukkan sebagai eksibit pihak pendakwa apabila PW3 dipanggil semula. Apabila disoal oleh peguambela semasa pemeriksaan balas, PW3 berkata bahawa beliau telah menyegarkan ingatannya dengan P27 semasa memberi keterangan di mahkamah. PW9, semasa pemeriksaan balas, menafikan bahawa kandungan P4 sebenarnya dijumpai di perkarangan rumah di dalam silinder keluli itu dan bukan di dalam beg kelabu (P4). Peguambela dengan segera memohon kepada mahkamah untuk perintah supaya satu salinan P27 diberikan kepadanya oleh pihak pendakwa untuk membolehkannya memeriksa balas PW9 dan saksi-saksi yang lain jika perlu dan permohonan itu telah dibenarkan.

Diputuskan, membebaskan dan melepaskan si tertuduh:

(1) Pengeluaran sepenuhnya peruntukan asal di dalam s 113(1) Kanun Acara Jenayah (FMS Bab 6) ('Kanun itu') yang menyatakan bahawa 'no statement made by any person ... in the course of a police investigation ... shall be used as evidence' dan penggantiannya dengan peruntukan baru yang menyatakan bahawa 'where any person is charged ... any statement ... by that person ... shall be admissible in evidence ... and ... may be used in cross-examination for the purpose of impeaching his credit', mempunyai kesan yang jelas dan pasti untuk mengetepikan perbezaan yang wujud sebelum pindaan itu di antara laporan polis pemberitahuan kali pertama (first information police report) dan laporan polis pemberitahuan bukan kali pertama. Lantaran itu, pihak pendakwa tidak boleh enggan memberikan satu salinan laporan PW3 (P27) kepada pihak pembela atas alasan bahawa ianya bukan satu laporan pemberitahuan kali pertama atau untuk apa-apa alasan yang lain. Walaupun laporan seperti P27 tidak boleh dan tidak dikemukakan untuk tujuan sokongan (corroboration), sebaik sahaja ianya dikemukakan sebagai eksibit pihak pendakwa, ia menjadi keterangan substantif dan pihak pembela boleh mengulas tentangnya berkenaan dengan ketekalan dan kejujuran saksi itu.

(2) P27 mendedahkan dengan jelas bahawa bahan perkara tuduhan pertama, iaitu tiga pucuk pistol, tidak sekali-kali dijumpai di dalam P4. Ini bermakna bahawa si tertuduh tidak, sebagaimana yang didakwa melalui testimoni lisan saksi, ditangkap dengan benda yang membabit iaitu tiga pucuk pistol dalam tangannya,

tetapi pada hakikatnya tiga pucuk pistol itu telah dijumpai di luar rumah itu di dalam D22. Apabila mahkamah mempertimbangkan keterangan lisan PW3 dan PW9 dan kenyataan di dalam P27, mahkamah mendapati bahawa terdapat percanggahan yang amat sangat dan penting di antara mereka tentang eksibit yang dijumpai di dalam P4. Oleh itu terdapat kekurangan keterangan yang boleh dipercayai atas tuduhan pertama dan tuduhan itu tidak boleh disokong kerana ianya tidak dibuktikan bahawa badan perkara tuduhan itu berada di dalam pemilikan si tertuduh.

(3) Berkenaan dengan tuduhan kedua, kandungan P27 dan keterangan lisan PW3 dan PW9 tidak boleh kedua-duanya benar dan mahkamah mendapati bahawa kedua-dua orang saksi telah berbohong atas fakta yang boleh ditentusahkan. Dalam keadaan di mana pihak pendakwa mengemukakan dua set keterangan, setiap satunya bercanggah dengan dan melawan yang lain dan menunjukkannya sebagai tidak boleh dipercayai, mahkamah akan ditinggalkan tanpa apa-apa keterangan yang boleh dipercayai yang boleh mengasaskan penyabitan si tertuduh. Terdapat juga kelemahan-kelemahan yang lain dan aspek-aspek yang tidak memuaskan dalam kes pihak pendakwa yang mengakibatkan tidak selamat untuk memanggil si tertuduh mengemukakan pembelaannya.

(4) Memandangkan pengakuan PW3 bahawa beliau telah mengulangkaji laporannya (P27) sebelum beliau memberi keterangan dan juga telah dari masa ke semasa merujuk kepadanya semasa diperiksa balas, beliau telah memberi keterangan dalam cara yang tidak etikal, tanpa mendedahkan pada masa yang penting percanggahan yang besar yang telah dilihatnya di dalam P27. Beliau telah merosakkan kebolehpercayaannya sebagai seorang saksi dan telah memperdaya mahkamah dengan sengaja. P27 menyatakan bahawa tiga pucuk pistol itu telah dijumpai di dalam D22 tetapi PW3 telah memberi keterangan bahawa mereka dijumpai di dalam P4. Memandangkan yang P27 adalah laporan yang dibuat pada hari apabila kesalahan itu dilakukan, adalah jauh lebih mungkin bahawa kesemua barangan yang menyalahi undang-undang di dalam kedua-dua tuduhan itu dijumpai di dalam D22 dan bukan pada badan si tertuduh. Lantaran itu, asas kes pihak pendakwa bahawa si tertuduh telah ditangkap dengan barangan yang membabit dalam tangannya roboh.

(5) Adalah kelakuan yang tidak patut dan sama sekali sukar hendak dipercayai bahawa penolong pendakwa raya, sedangkan beliau mengetahui dengan jelas akan kandungan P27 dan memahami dengan baik kesan keterangan lisan yang penting yang diberikan oleh PW3, tidak pada detik masa itu juga dan mengikut kerelaan hatinya sendiri dengan segera membawa P27 ke perhatian PW3 dan meminta penjelasan daripadanya. Ini akan mengelakkan pelanggaran s 91 Akta Keterangan 1950. Dalam kes ini, penolong pendakwa raya telah cuba mendapat penjelasan daripada PW3 dengan memanggilnya semula dan mengemukakan P27 sebagai

satu eksibit cuma selepas mahkamah telah mengarahkan pemberian satu salinan P27 kepada peguambela. Di sini, kelakuan penolong pendakwa raya telah memberikan tanggapan kepada peguambela bahawa beliau telah cuba menyelindungi kebenaran.

Per curiam:

Seksyen-seksyen 35 dan 157 Akta Keterangan 1950 tidak boleh dibaca sebagai membenarkan pihak pendakwa menggunakan kenyataan yang dibuat dan dicatit selepas penyiasatan telah bermula, sama ada ianya dalam bentuk laporan pemberitahuan kali pertama atau laporan pemberitahuan bukan kali pertama untuk menyokong testimoni seseorang saksi, kerana ianya tidak adil dan tidak saksama kepada si tertuduh jika kebenaran diberi untuk laporan terkemudian atau laporan pemberitahuan bukan kali pertama yang menyenaraikan bahan-bahan yang diperolehi daripada suatu penyiasatan, yang dimulakan oleh satu laporan pemberitahuan pertama, digunakan untuk tujuan memberi sokongan. Ini adalah kerana kandungannya akan dibentuk supaya padan dengan bahan perkara dalam kes itu sebagaimana yang telah terbentuk.]

Notes

For cases on the offence of possession of firearms and ammunition, see 4 *Mallal's Digest* (4th Ed) paras 260–265.

For a case on the admissibility of a police investigation report as evidence, see 7 *Mallal's Digest* (4th Ed) para 1260.

For a case on the credibility of a witness when there are discrepancies between the police report and the testimony, see 7 *Mallal's Digest* (4th Ed) paras 521 and 1371.

Cases referred to

1 *PP v Lee Hoay Chun* (Penang High Court Trial No 47(58)–13–88) (unreported) (refd)
2 *Wai Chan Leong v PP* [1989] 3 MLJ 356 (refd)
3 *Das v Weston* 16 CWN (refd)
4 *PP v Foong Chee Cheong* [1970] 1 MLJ 97 (refd)
5 *Ah Mee v PP* [1967] 1 MLJ 220 (refd)
6 *PP v Ibrahim bin Ariffin* (Penang High Court Criminal Trial No 47–17–91) (unreported) (refd)
7 *Pavone v PP* [1986] 1 MLJ 72 (refd)
8 *PP v Mohamed Noor bin Jantan* [1979] 2 MLJ 289 (refd)
9 *Haw Tua Tau v PP* [1981] 2 MLJ 49 (refd)
10 *Munusamy v PP* [1987] 1 MLJ 492 (refd)
11 *PP v Peter Yeoh & Anor* [1993] 1 CLJ 78 (refd)
12 *Abdullah Zawawi v PP* [1985] 2 MLJ 16 (refd)
13 *PP v Yap Boon Chang* [1992] 2 CLJ 1257 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 113(1)
Evidence Act 1956 s 157

V Sithambaram and *M Athimulam* (*Kumar, Sitham & Co*) for the accused.
Kamardin bin Hashim and *Ahmad Shahrir bin Mohd Salleh* (Deputy Public Prosecutors) for the public prosecutor.

Vincent Ng JC: The accused was charged as follows:

First charge

That you on 6 October 1986 at about 6.50am at a house No 451-P, Jalan Pokok Cherry, Air Itam, in the District of Georgetown, in the State of Penang, within security area as proclaimed by the Yang di-Pertuan Agong vide PU(A) 148 dated 15 May 1969, without lawful excuse did have in your possession firearms, to wit, one .38 Smith and Wesson special revolver bearing No (Yoke) 51327 mod 10-5, one .38 Smith and Wesson special revolver bearing No (Yoke) 67601 mod. 10-5, and one .38 Smith and Wesson special revolver bearing No 24152, without lawful authority, that you have thereby committed an offence under s 57 (1)(a) of the Internal Security Act 1960 (Rev 1972) and punishable under s 57(1) of the same Act.

Second charge

That you on 6 October 1986 at about 6.50am at a house No 451-P, Jalan Pokok Cherry, Air Itam, in the District of Georgetown, in the State of Penang, within security area as proclaimed by the Yang di-Pertuan Agong vide PU(A) 148 dated 15 May 1969, without lawful excuse did have in your possession ammunition, to wit 86 rounds of .38 inch special without lawful authority, and that you have thereby committed an offence under s 57(1)(b) of the Internal Security Act 1960 (Rev 1972) and punishable under s 57(1) of the same Act.

At the opening speech of the learned deputy public prosecutor, Encik Kamardin bin Hashim (assisted by Encik Ahmad Shahrir bin Haji Mohd Salleh) stated that the prosecution would prove both the charges by direct and circumstantial evidence.

The prosecution called two material and principal witnesses, being ASP Sat Pal Jain s/o Churanji Lal (PW3) and Insp Tan Boon Hooi (PW9).

PW3 stated that on 6 October 1986 at 6.50am he led a police raiding party to raid a house No 451-P, Jalan Pokok Cherry, Air Itam, Pulau Pinang (hereinafter called 'the said house') together with 16 other police officers including PW9. He and the said members of the raiding party entered the compound of the said house through the front gate of the fence which was (until then) closed but not padlocked. When they entered the house compound PW3 saw, on the right at a distance of approximately 12–15ft away from him, a male Chinese (identified as the accused) walking towards him to the said front gate while at the same time holding a grey bag (identified as P4) in his right hand. As soon as the accused saw the police raiding party he tried to escape and PW3 and the other officers of the raiding party shouted, 'Berhenti, polis! Polis,' while they chased after the accused. PW3 together with three other raiding officers then apprehended the accused after some struggle which resulted in the singlet worn by the accused being torn, blood stained and divested from his person. The moment the accused was caught, P4 which he was then holding fell onto the floor and he was then immediately handcuffed.

A P4 was then examined in front of the accused and when the bag was unzipped they found the following items:

(1) a glucose tin (P5) within which contained one yellow plastic bag (P5(A)) which held 39 live bullets of .38 special calibre (P5(B)).
(2) one dark blue coloured sock (P6) which held 15 live bullets of .38 B special calibre (P6(C)).
(3) one grey coloured sock (P7(A)) which held 18 live bullets (P7(C)) of a .38 special calibre.
(4) one white coloured sock with blue stripes (P8(A)) which held 14 live bullets of a .38 special calibre (P8(C)).
C (5) one blue coloured sock (P9(A)) which held one Smith & Wesson special revolver bearing serial No 51327 (P9(C)).
(6) one blue coloured sock (P10(A)) which held one Smith & Wesson special revolver bearing serial No 67601 (P10(C)).
(7) one white coloured sock (P11(A)) which held one Smith & Wesson special revolver bearing serial No 24152 on its butt (P11(C)).
D (8) one pair of handcuffs of 'Super-K' brand (P14).

This witness also said, to quote: 'Tiada lain-lain barang kes dijumpai dalam P4'. PW3 also found and arrested four females in the said house, who were the wife and three children of the accused. He subsequently conducted a search of the said house and found no incriminating items therein.

E ASP Hasni bin Hitam Sopki (PW6), a firearms expert, testified that the aforesaid three revolvers (P9(C), P10(C) and P11(C)) were serviceable and dischargeable and the 86 bullets (P5(B), P6(C), P7(C) and P8(C)) were live and usable bullets. Neither his expertise nor his findings were challenged by the defence.

F PW3 however said that at about 9am on the same day, following a search in the compound outside the said house, Sgt Ramli found a black steel cylinder closed with lid (identified as (D22)) which contained one pistol, two revolvers and 109 bullets, the details of which was elicited from PW9 as follows:

G (i) one white coloured sock (D23) which held one Llama 11 pistol of 9 mm .38 calibre (with serial number erased) with one empty magazine (the pistol together with the magazine marked as D23(A));
(ii) one white coloured sock (D24) which held one Smith & Wesson revolver of .38 calibre bearing Serial No CTG 41914 (D24(A));
(iii) one white coloured sock (D25) which held one Smith & Wesson special H revolver bearing Serial No CTG 54685 of .38 calibre (D25(A)); and
(iv) 109 bullets.

Both these witnesses namely PW3 and PW9 corroborated each other in material particulars, particularly that P5(B), P6(C), P7(C) and P8(C) (ie totalling 86 of .38 special live bullets) and P9(C), P10(C) and P11(C) (the I three .38 Smith & Wesson special revolvers) were found in the grey bag (P4) held by the accused in his right hand when he was apprehended. The only divergence in evidence between these two witnesses being that PW9 included two further exhibits namely a pair of black long pants (Pl9) and a handkerchief (P20) as part of the contents of P4, whereas PW3 categorically

asserted in his examination-in-chief that nothing else was found therein besides the items he had enumerated in his evidence.

PW3 also said he lodged a police report being Air Itam Police Station Report No 2440–1/86 (P27) at 12.30pm on the said day, ie 6 October 1986 (only put in as a prosecution exhibit subsequently, when he was recalled). When PW3 was asked by defence counsel in cross-examination whether he had refreshed his memory with this report, he admitted as follows, to quote him: 'Sebelum saya memberi keterangan saya ada membaca statement dan laporan polis — laporan polis saya membuat pada 6 Oktober 1986 pukul 12.30 petang.' When this witness was recalled by the prosecution in order to tender P27 he again stated under cross-examination: 'Sebelum dan semasa saya memberi keterangan dalam mahkamah saya telah dan ada merujuk kepada P27.'

When, in cross-examination, PW9 denied the question put to him by Mr Sithambaram that the contents of P4 were in fact found in D22 at the compound outside the said house and not in P4, counsel immediately applied for an order of this court that a copy of P27 be supplied to him by the prosecution to enable him to cross-examine this and other witnesses if it became necessary. This was objected to by the learned DPP Encik Kamardin and the court's ruling was as follows:

The complete removal of the original provision in s 113(1) of the Criminal Procedure Code (FMS Cap 6) ('the CPC') by virtue of Act A324 which states: 'No statement made by any person ... in the course of a police investigation ... shall ... be used as evidence' and its replacement with a new provision which states: 'Where any person is charged ... any statement ... by that person ... shall be admissible in evidence ... and ... may be used in cross-examination for the purpose of impeaching his credit' — the latter provision concerns and pertains only to any person who is charged as opposed to the earlier generalized provision — has the effect of clearly and decisively removing the pre-amendment distinction between first information and non-first information police reports.

There is thus no justification for the refusal by the learned DPP to supply a copy of PW3's report to the defence on the ground that same is not a first information report or for any other reason; it being also, a public document by virtue of s 35 of the Evidence Act 1950 ('the Act'). See *PR v Lee Hoay Chun*[1] and *Wai Chan Leong vs PP*[2] at p 1171E (right).

The only residual distinction that remains is that whereas a first information report may be tendered and admitted in evidence under s 108A of the CPC, if only due to its value for the purposes of comparing its material with subsequent materials derived from investigations ensuing the first information report, it is nevertheless impermissible to read ss 35 and 157 of the Act as permitting the prosecution to use statements made and recorded after investigations have commenced, be it in the form of police reports or otherwise, eg non-first information reports, to corroborate the testimony of a witness.

It is patently unfair to the accused persons and unjust to allow subsequent or non-first information reports detailing and setting out materials derived from an investigation, initiated and set into motion by a first information report, to be used for corroborative purposes. The reason being that the

A contents of such subsequent reports would obviously be made to dovetail with materials in the case as has then developed. The import of the words [in italics] in the expression '... before any authority legally competent *to investigate the fact* ...' in s 157 of the same Act fortifies this view. See *Das v Weston*;[3] *PP v Foong Chee Cheong*[4] and *Ah Mee v PP*.[5]

B Although P27 could not be and was not put in for corroborative purposes, as soon as it was put as prosecution exhibit, it became substantive evidence and liable to be commented upon by the defence as regards consistency and truthfulness of PW3.

As the court held the view that it was imprudent to take a peep into the contents of P27 before making a ruling on counsels' application, neither the C court nor counsel were then aware of the gathering thunderstorm that P27 generated in its wake.

Just a week earlier this court had allowed a similar application by the defence in another case based upon the same principles. However, counsel therein could make nothing of the copy of the police report supplied to him D pursuant to my ruling in his favour. See *PP v Ibrahim bin Arifin*.[6]

Following the court's order that the copy of P27 be supplied to the defence the learned deputy public prosecutors recalled PW3 and formally tendered P27 as an exhibit. He then asked PW3 to explain the very material discrepancy between his oral testimony and P27. This was strongly opposed by Mr V Sithambaram, though the latter did not object to the tendering of E P27 per se as an exhibit for obvious reasons.

After hearing submissions by both parties, the court upheld counsel's objection on the following grounds:

(1) A police report is the sort of document which s 107(i) of the CPC says has to be reduced to writing, and as such it is clearly a document in F writing within the purview of ss 91 and 92 of the Act, which excludes the admission of parol evidence for the purpose of contradicting, varying or subtracting from its terms.

(2) Section 91 of the Act applies equally to criminal trials no less than civil proceedings. See *Ah Mee v PP*[5] at p 222I (left) to C (right) and p 223A (left). This case had also been cited with the approval in *Pavone v Public* G *Prosecution*[7] at p 74H (left) wherein Edgar Joseph Jr J (as he then was) had said, to quote: 'This in turn would bring into play s 91 of the Act which applied as much to criminal as to civil proceedings. So far as material to this case, it provides, "In all cases in which any matter is required by law to be reduced to the form of a document no evidence H shall be given in proof of the terms ... of such matter except the document itself." Similarly, s 92 of the Act would operate to exclude all parol evidence seeking to contradict or vary what was set out in writing.'

(3) It was not a case where the learned deputy was applying to impeach PW3.

I (4) PW3 had also stated that he had not only refreshed his memory with P27 before he testified, but indeed he made several requests to refer to and was in fact staring at the report while he gave evidence. He could and should have then revealed the discrepancy and enlightened the court then if any explanation was needed.

As the prosecution had tendered P27 it ought to be taken to rely on its contents as part of its case and also to invite comments thereon by the defence.

The comments and my findings being:

A On the first charge

P27 clearly disclosed that the subject matter of the first charge being the three revolvers, were never found in P4. This would mean that the accused was not, as alleged in the oral testimony of the witnesses, caught red-handed with the three revolvers being exhs P9(C), P10(C) and P11(C) but rather these three revolvers were found outside the house encased in D22. PW3 said, 'Di sekitar kawasan luar rumah, Sgt Ramli jumpa satu cylinder besi yang mengandungi satu pistol, dua revolver dan 109 butir peluru'.

It was submitted that P27 was lodged by PW3 as complainant in the case. It was this report that caused the opening of investigation papers. It was a detailed report concerning the manner of arrest and the exact items seized, with serial numbers, calibre and make, etc of the five revolvers and one pistol, and therefore a complete report of the respective contents of P4 and D22.

PW3 said that a detailed search of P4 was carried out inside the said house. This was when he also noted the serial numbers of the three revolvers and counted the 86 bullets as the exhibits were arranged therein, and this was confirmed by PW9. The police photographer (PW1) tendered the photographs P2(F) and (G) showing P4 and its contents.

When the court considers the parol evidence of PW3 and PW9 and the photos P2(F) and P2(G) vis-a-vis the statements in P27, the court finds that there is an acute and material contradiction between them in regard to the exhibits found in P4.

According to P27 the accused was not arrested with the three revolvers P9(C), P10(C) and P11(C) in P4 (the subject matter of the first charge) but these three revolvers were found in D22. It is thus my finding that P27 had the effect of demolishing and rebutting the oral evidence of PW3 and PW9 as well as the photographs P2(F) and P2(G) for the purposes of s 180 of the CPC. *PP v Mohamed Noor bin Jantan*[8] at p 290C (left).

Furthermore, Sgt Ramli was not called to enlighten the court as to whether the said three revolvers were found in P4 or D22. It is thus inherently incredible for the three said revolvers to be found in two places, ie in P4 (a grey bag) and also in D22 at the compound outside the house. See *Haw Tua Tau vs PP*[9] and *Munusamy v PP.*[10] Credible evidence on the first charge is thus lacking and the charge cannot stand as it has not been made out that the subject matter of the charge were in the possession of the accused.

B On the second charge

The statements in P27 would imply that besides all the bullet exhibits, namely, P5(B) (39 live bullets), P6(C) (15 live bullets), P7(C) (18 live bullets) and P8(C) (14 live bullets) totalling 86 bullets, 83 other live bullets

were also found in P4 (making a grand total of 169 bullets) but none were found in D22. The dilemma is that whereas P27 says that 169 bullets were found in P4, both PW3 and PW9 testified that 86 bullets were found in P4 and 109 bullets were found in D22, thus making a grand total of 195 bullets recovered on that day. It is impermissible for the court to amend the second charge from 86 bullets to 195 bullets as both of the said witnesses had not said that the accused was also in possession of the 109 bullets found in D22 and the same were not produced, identified or marked. It also follows that since the 109 bullets were not produced and marked separately the court would not be able to ascertain whether a portion or all of the 86 bullets came from the 109 bullets found in D22.

By the same token, even on the basis of P27, as the balance 83 bullets allegedly found in P4 were not produced in court and marked, the court cannot amend the second charge from 86 bullets to 169 bullets in as much as the court would not know the identity of the 83 bullets allegedly found in P4 according to P27.

This is quite apart from the implication that the two versions, in P27 as opposed to their oral testimony on the total bullets recovered on that day, would leave 26 bullets unaccounted for.

The contents of P27 and the oral evidence of PW3 and PW9 both cannot be true. If P27 is false, then PW3 could be charged under s 182 of the Penal Code (FMS Cap 45) for having lodged a false report punishable with imprisonment for a term which may extend to six months and if the evidence of PW3 and PW9 in this court in the capital charge is false, they shall be liable to be charged under s 194 of the Penal Code (FMS Cap 45) punishable with imprisonment for a term which may extend to 20 years and if they have given or fabricated false evidence, intending thereby to cause the accused to be convicted of an offence which is capital, they shall be punished either with death or the punishment hereinbefore described.

Could such evidence which would attract a criminal charge against the witness in either event aforesaid, be used to found a prima facie case against the accused? My answer is in the negative.

The prosecution has called PW3 and PW9 as witnesses of truth and as their evidence have not been impeached, their contradiction in respect of revolvers seized and gross inconsistencies in respect of the bullets when considered in conjunction with P27, remains. This court holds that they had lied on facts which are verifiable and consequently what credence could be attached to their testimony on facts which are not verifiable?

In his reply, the learned DPP Encik Kamardin also admitted that the evidence adduced in court amounted to two versions of the prosecution case.

The function of the court in a criminal trial is to find whether the person arraigned before it as the accused is guilty of the offence with which he is charged. For this purpose the court scans the material on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to found the conviction of the accused and to hold that he is guilty of the offence with which he is charged. If in a case the prosecution leads two sets of evidence, each one of which contradicts and

strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation.

I have also found in the prosecution case the following infirmities and unsatisfactory features which makes it unsafe for me to call the accused to enter upon his defence, though this finding pales in comparison with my above findings in respect of counsel's complaints as in (a) and (b) below.

(i) PW3 said that he took with him all the exhibits found on that day some time after 9am and he lodged a police report at 12.30pm on the same day. There was no evidence as to where he kept the exhibits and who guarded them during this interval, considering that they were not light exhibits.

(ii) The bullets recovered from P4 and from D22 (as per oral evidence) were not individually marked to distinguish the two respective recoveries; the 86 and 109 bullets have not been kept in separate envelopes or sealed or marked and neither was there evidence that they were kept separately until about 11am on the following day when it was handed to the IO Tan Kok Liang (PW2). See *PP v Peter Yeoh & Anor.*[11]

(iii) Insp Seah Chong Beng who took out and returned a particular revolver three times and who was also the officer who collected all the exhibits from PW8 and handed to PW4, was not called but merely offered. Offering and making available witnesses to the defence by the prosecution is only for the sole purpose of avoiding the invocation of s 114 (9) of the Act by the defence, and not to enable the prosecution to discharge the burden, incumbent upon them throughout the case, to prove the essentials of the charge, including the fact that the exhibits produced in court are the exhibits seized from the accused, ie an unbroken chain of handling of the material exhibits. See *Abdullah Zawawi v PP.*[12]

(iv) The torn blood stained singlet which the accused was alleged to have worn at the time he was caught (to show the manner he was caught as claimed) was neither recovered nor produced as an exhibit.

Counsel Mr Sithambaram prepared his submission of no case to answer with truly uncommon passion and addressed the court at length with equal vigour.

The main thrust of the submission — nay, complaint — was that, to quote him:

(a) in regard to the two witnesses:

> P27 has afforded the court to hold that PW3 and PW9 were lying through their teeth. If the police report is a false report he is chargeable under s 182 of the Penal Code and if their evidence in a capital case is false he is chargeable under s 194 of the Penal Code punishable with 20 years imprisonment; then such evidence cannot possibly found a prima facie case under s 180 of the CPC;

and,

(b) in regard to the conduct of the two DPPs, he had this to say:

> I seriously submit that there has been a very deliberate and material suppression of evidence by the learned DPPs in that P27 was not introduced by the prosecution

A when PW3 gave evidence contradicting his police report which was in the hands of the prosecution. Their conduct gave me sleepless nights. P27 could not have come to light if the court had not ordered a copy of P27 to be supplied. Had the report not been produced it would have caused a gross miscarriage of justice. The prosecution had sought to produce P27 for clarification purposes only after they were caught with their pants down.

B

These words rang loud with reverberations and inevitably called for this court's comments. With respect I have found transgressions by the two witnesses and the DPPs precisely as alleged by Mr Sithambaram based on the evidence presented and the sequence of the presentation of P27.

C

In regard to complaint (a)

In view of PW3's admission that he had reviewed his report (P27) before he gave evidence and had also on occasion even referred to same while he was examined and pointedly cross-examined on the contents of P4 and D22 respectively, he had indeed given evidence in an unethical manner and had D utterly discredited himself as a witness. It was virtually tantamount to seeing white in his report while saying black. The court views with abhorrence the cavalier manner in which PW3 had held out to the court that what he was seeing was what he was saying, and without disclosing, at that material time, the gross discrepancies in what he saw in P27. P27 states, inter alia, E that the three revolvers were found in the black metal cylinder (D22) outside the said house, but yet he testified that same were found in the grey bag (P4) that the accused was holding when apprehended. He had thus intentionally misled the court. As PW9 must have been aware of the contents of P27, his evidence is equally discreditable for having chosen to corroborate and support PW3's evidence in almost every detail.

F If PW3's testimony in court was the truth and his report (P27) was untrue, it is most incredible that he had not lodged a corrective report containing materials which accords with his oral evidence, contemporaneously with the lodgement of P27. Had a contemporaneous and corrective report been lodged it could and would have been tendered G as an exhibit together with P27 by the learned DPPs without running the gauntlet of s 91 of the Act and the authorities aforesaid. Obviously this was not done, as probably there was nothing then to correct.

As P27 is a report lodged on the day of the offence, it is far more likely that all the offending items in the first and second charge as well as the two other revolvers D24A and D25A and a pistol D23A together with all the H bullets recovered on that day were found in the black steel cylinder (D22) outside in the house compound and not on the person of the accused. The basic foundation of the prosecution case, that the accused was caught red-handed with P4 containing the offending items while walking away from the house soon after he saw the raiding party arrive, thus crumbles.

I Counsel also submitted that the outrageous conduct of the two senior police officers in the present case was evocative of my poignant observation in an earlier case where, in acquitting the accused — after having found that evidence of possession against him had been fabricated — I had said: 'Even three senior police officers acting in concert and talking in near perfect

harmony on certain material details in their evidence though — drawing a blank on other pertinent details, as appeared to be the case here — should not, in the interest of justice, be allowed to claim exclusivity or monopoly to the truth without submitting to the court's overriding duty to examine every detail in their evidence with the view to testing their veracity in conjunction with the rest of the evidence in their totality.' There was no appeal from this decision. See *PP v Yap Boon Chang.*[13]

It cannot be gainsaid that it becomes that much more difficult for the court to steer to a just decision in a battle of two versions of lies between liars who had shown scant regard for the truth and the sanctity of the solemn oath that they have taken in court. Surely, in the public interest, a higher standard of conduct is expected of police officers especially when giving sworn evidence in court. In as much as it is in the essential interest of the public that criminals should be caught and put away from their nefarious activities, it is equally essential for law enforcers to demonstrate that they stand on a higher moral plane than the criminals that they sought to put away; they must be mindful of the fact that the law abiding public too would have to deal with them from time to time and vice versa and they cannot function in vacua.

In regard to complaint (b)

It is conduct unseeming and wholly incredible that the learned DPPs, being fully aware of the contents of P27 and keenly appreciating the ramifications of the material piece of oral evidence as it tumbled out from PW3, did not at that point in time and of their own volition, promptly throw in P27 at PW3 and sought to seek clarification from him. This would have avoided their skirmish with s 91 of the Act.

In this case, the learned DPPs had instead held P27 close to their chests; had strongly resisted (though they said, for the record only) the supply of same to counsel; and had sought to get PW3 to clarify by recalling him and producing P27 *as an exhibit, only after* the court had ordered the supply of a copy of same to counsel.

Even if they were then labouring under a mistaken belief that they had the right to refuse supply of a copy of P27 to counsel, yet their duty to help the court arrive at the truth and to honour truth itself overrides any lingering ill-founded eagerness that they may harbour, to satisfy their superiors that they have robotically objected to the objectable. Surely, the eternal question of which version if any, abides by the truth is solely and exclusively within the domain of judicial determination and not within the purview of counsel or DPPs.

It is appropriate here to remind DPPs as well as counsel to conduct their cases before the courts, with stout confidence in their own wit and grit and command of the facts and the language rather than by guise and guile, unworthy of their role as officers of the court.

The reaction of Encik Kamardin to Mr Sitham's complaint, that the two main prosecution witnesses had lied through their teeth in a capital charge against his client, was that he had not coached them to testify the way they had in court. While it is to their credit that the proceedings disclosed no

improprieties by the learned DPPs in this regard, surely their duty to the court (in as much as the bounden duty of defence counsel as officers of the court) would require of them — in the wider interest of justice — more than merely taking heed of the euphemistically expressed caveat not to teach the witness how to tell the truth. Unfortunately, their conduct had given counsel the impression of suppression of truth.

Public interest consideration demands that criminals be apprehended, rightly charged, fairly tried, justly convicted and appropriately sentenced. It is only through an interplay of good law officers, honest but able DPPs, ethical lawyers and competent magistrates and judges that these essential links in the administration of justice and maintenance of law and order is ensured for society; a shortfall in any of these links hardly serves public interest.

I am convinced that we Malaysians are endowed with the correct social ethos and cultural ingredients to display with natural ease, a sense of justice second to none in the world, and without distinction between rank and status, colour or creed, alleged criminal or verified saint. I am sure what has happened in this case is only an aberration.

Considering a state such as Penang which has in recent years seen a rise of crime of violence involving the use of firearms — indeed, recently two lawyers have been shot here within the span of three months — and it is thus in the imperative interest of the public that gun runners be vigilantly apprehended and dealt with with the full force of the law, it is utterly regrettable that the accused should succeed due to the aforesaid gross infirmities in his arrest and prosecution. Obviously the principle adumbrated above is more important than the case itself, and so, with considerable regret, this court has no option but to acquit and discharge the accused on both the charges without calling him to enter upon his defence.

Order accordingly.

Reported by GK Ganesan